



## Fact Check on Washington Supreme Court Justices Opinion in the Overtime Ruling

*The concurring opinion signed by three justices reveals a remarkable level of ignorance, prejudice and characterizations of farmworkers likely to deeply offend. The public needs to know about the faulty basis for their decision and the harm it has done to farmworkers and the farmers that employ them.*



Three justices, Chief Justice Steven Gonzales, Cheryl Gordon McCloud, and Mary I. Yu, signed a concurring opinion to the November 5, 2020 ruling by the Washington Supreme Court that overturned the 1959 state law providing overtime exemption for farmworkers. The 5-4 ruling was strongly objected to by the minority justices, and has led to an explosion of lawsuits against farmers from class action attorneys as far away as Los Angeles.

The majority justices appear to believe that farmworkers would be helped by overturning a longstanding state law. The opposite has happened and a great many farmworkers are reaching out to the state legislature asking for lawmakers' help in protecting their jobs against the more than 30 lawsuits filed since this ruling. Those lawsuits were prompted by the court's damaging decision.

Here we will examine in some detail the offensive and unsupportable statements made by the three justices in the [concurring opinion published with the court ruling](#). We will see that not only are they wrong in almost every assessment about farmworkers, their pay, the safety risks and political status, but that their prejudiced and error-filled judgments are proving very harmful to the farmworkers they may have thought they were helping.

## OVERVIEW

We will provide the opinions expressed by the judges presented as statements of fact. Then we will show how far from reality these opinions are.

- The judges say farmworkers earn subpoverty wages. But farmworker families earn on average in their communities an equivalent amount to family earnings of well over \$100,000 for those living in Seattle.
- Judges say farmerworkers work in dangerous conditions. Yet, a number of other jobs are far riskier—including sales jobs!
- Judges say that farmworkers are excluded from protections afforded other workers, but the truth is no worker group has more protections than farmworkers.
- Judges say farmworkers need constitutional protection because they are second class citizens, have no access to the



*Farmworkers like this one have appealed to state lawmakers in the January 28 hearing and on videos asking for leaders to save their jobs. The judges ill-informed ruling triggered an avalanche of lawsuits that, unless stopped, will destroy hundreds of family farms and thousands of valuable farm jobs. [See them speak out here.](#)*

legislature and are in a caste system, making them similar to the lowest class Dalits in India. But, farmworkers have unprecedented access to the legislature by those saying they represent their interests as well as the farm community fighting to keep their jobs. Farmwork requires skill, dedication and experience and farmworkers do this with dignity and pride. We believe they would find the judges' characterizations prejudicial and offensive.

## JUDGES' OPINION

*"Farmworkers across our state and our nation labor for subpoverty wages under dangerous working conditions to supply food for our tables. But since the 1930s, they have been excluded from many labor protections guaranteed to virtually all workers in other industries."*

## FACT CHECK

### 1. Farmworker Income Levels

One must conclude that either these justices are ignorant of the facts or the views they express in other portions of the opinion lead them to make highly inaccurate statements. [The Washington Department of Health reported that the 2014 federal poverty level was about \\$23,000 per year.](#) In that year it reported about 13% of Washington residents were under the poverty line compared to about 16% of Americans overall. The [Census Bureau reported for 2019 Washington's poverty level was at 9.8%.](#) In general Washington fares well against the rest of the nation, and particularly in pay to farmworkers. No state pays more for farm labor than Washington with the exception of Hawaii. The federal guest worker program mandates minimum wage for guest workers and all domestic workers who hold the same job with the same employer. In 2020 that minimum wage was \$15.83 per hour—the highest in the nation. In 2021 that rate goes to \$16.34 per hour, again the highest in the nation along with Oregon.

[For 2020 the federal poverty level increased to \\$26,000 per year for a household of four.](#) On farm wages, [Washington's Employment Security Department reported:](#)

*"From 2007 to 2017, average annual covered wages in agriculture increased approximately 1.7 percent annually, from \$24,412 to \$28,991. From 2016 to 2017, growth in statewide agricultural wages was approximately 3.2 percent. South Central Area 2 [Yakima and Klickitat counties] had the highest average annual wage in 2017 at \$30,721."*

Using the same level of 1.7% annual increase and with \$30,000 as the average for 2017, average farm wage in 2020 would be \$31,556. It is almost certain the wage rates rose faster than 1.7%, so \$32,000 is a conservative estimate.

That means with just single income households, the average farmworker in Washington was well above the poverty level. However, about 57% of households in the US are dual income. Assuming that is accurate for farmworker households, the estimate of household income if both wage earners were employed as farm employees, that adds \$18,240 to the average household income. That means average farmworker household income in Washington is over \$50,000—about twice the national poverty level.

Many farmworkers ask to work more than 40 hours. If 50% of farmworkers work an average of 60 hours per week that would increase the average household income to about \$75,000. For the purpose of this analysis we will assume a more conservative estimate of \$65,000 per household annual income.

But, there is more when you take into consideration cost of living. The Washington Supreme Court operates from Olympia, part of the Puget Sound region that is by far the wealthiest area of the state. Most of the lawsuits have been filed against dairy farms located in Yakima and surrounding counties. Yakima and neighboring counties have the lowest cost of living in the state.

[Yakima is ninth lowest out of 39 counties.](#)

What does this mean for farmworkers? That \$65,000 household income would make life quite difficult in King County where the hourly self-sufficiency rate is calculated at \$17.61 per hour. For Yakima County, that self-sufficiency rate is \$10.37 per hour. That means, of course, the farmworkers income goes much, much further in Yakima and surrounding counties than it would in King County. If

#### Understanding the state pay information:

The state farmworker pay figures include both full time and seasonal farm work, so actual average annual income is hard to determine. Seasonal workers who work three to five months have the opportunity to earn additional income in the remaining months.

employees choose not to work any overtime that \$50,000 income would be the equivalent of income of \$85,000 for someone living in Seattle. If just half choose to work the additional 20 hours per week, their Seattle-equivalent income would be \$127,000. All these figures are average. Some earn more, some less as in any type of business.

Is the judges' claim that farmworkers live in "subpoverty" conditions accurate? Not even close!



*This dairy farmworker likely earns more than the average based on his level of experience and responsibility. But our analysis shows that average farmworker families earn about \$65,000 to \$75,000 per year. Because they live in areas of very low cost of living, that income equates to a \$110,000 to \$127,000 family income for someone living in Seattle.*

## 2. Dangerous working conditions

The justices claim that farmwork is dangerous. Farming does involve transportation, heavy equipment, animals, materials and other elements that can make it dangerous. Certainly it is more dangerous than being a lawyer, labor leader or judge. However, farming is far from the most dangerous job. In fact, even a salesperson faces greater risks than a farmworker.

Farmworkers looking to move from farming to other types of work should note that many career options involve greater dangers.



*A dairy farmworker at a Western Washington dairy farm. The justices said these workers need protection because of the grave danger of their jobs. But a CNBC report shows that there are many jobs more dangerous including being a sales person! Those working in fishing are at far greater risk with construction workers have almost four times the risk of fatal injury as farmworkers. Garbage truck drivers face almost twice the risk of fatal accidents than farmworkers. It's one more example of the judges not getting the facts right.*

[CNBC has listed the ten most dangerous jobs.](#) Farming, with 24 fatalities per 100,000 employees is almost exactly the same as construction with 23.6 fatalities. However, it has one quarter the risk of logging, the number one most dangerous job with 97.6 fatalities per 100,000 workers.

Most farm accidents involve transportation. In fact, transportation is the largest risk factor on a great many jobs. Which is why drivers including those holding sales jobs involving travel face greater danger than farmworkers, with 26 fatalities per 100,000 employees. Refuse and recycling collectors are at risk with 44 fatalities per 100,000 employees. Roofers are over twice as likely to suffer fatalities than farmworkers with 52 fatalities per 100,000. Even aircraft pilots and flight engineers are far more at risk with 59 fatalities per 100,000. But fisher and fishing related jobs have 77 fatalities and logging almost 98 fatalities per 100,000.

Farmers take safety extremely seriously and there are numerous rules and regulations as well as farm industry regulations. Farm employees are often part of the family that owns and runs the farm and have been part of the family for years and even decades. Safety is crucial and despite the

inherent dangers, farming is far from the dangerous work that these justices appear to think it is.

### 3. Labor Protections

The justices directly state: "...since the 1930s, they [farmworkers] have been excluded from many labor protections guaranteed to virtually all workers in other industries."

This is apparently a reference to exclusions from the Federal Migrant and Seasonal Workers Protection Act (MSPA). The reasons they are not included under that law is because other laws provide similar or duplicate protections and thus the exclusion prevents confusion. It is far from true to say they are not protected. The fact is farmworkers are likely the most

protected of any worker category. If there are employment categories that have more protections we eagerly invite the judges, readers or experts to show us the applicable rules and enforcement regimens.

Rest breaks provide one example. Farmers are required to make certain all employees take rest breaks at very specified intervals in their schedule. They must also keep detailed records that prove the rest breaks have been taken. If they cannot produce those records, the courts assume that the breaks have not occurred and the penalties can be more than harsh. Even having farmworkers sign that they have taken the required rest breaks may be questioned in court.

Whatcom County District Judge Pro Tem David Cottingham reduced Tuesday the amount Sarbanand Farms will pay in state and county fines to \$74,825. The state Department of Labor and Industries originally imposed a penalty that totaled \$149,650.

"We're disappointed in the court's decision," L&I spokesman Tim Church said. "Late meals and missed breaks are serious violations that affected hundreds of workers over several days."

*A news report announces the \$149,650 state fine against a farm for a rest and meal break violations (most of the 13 were late by a few minutes) was reduced by a judge. We wonder: do the justices who claim farmworkers do not have protections under the law document every break their employees take? Do lawyers suing farmers make certain that their employees take breaks at very specific times of the day? What about teachers? No employee category is so protected as farmworkers--if that is not true, we challenge the judges, lawyers or experts to prove us wrong.*

One farm was fined by the Washington State Department of Labor & Industries for \$149,650 for a total of 13 rest and meal break violations. Most of those involved breaks taken a few minutes late. The court reduced the penalty in half. But it raises the question: what other employer faces this kind of scrutiny and regulation on breaks? Would a bank or Starbucks be fined for employees being a few minutes late on breaks? Do members of the legal support staff of the Supreme Court justices take breaks on such a regulated schedule, and do the justices who made this claim document each break that

their employees take? Do these justices or the lawyers who sue farmers face severe penalties for not documenting their employee's breaks?

Breaks are one issue, but numerous other protections apply. For example, farm employers are required to provide free housing to guest workers under the H-2A guest worker program. But, those rules also apply to any domestic worker who is employed in the same work as the guest worker. The housing and living conditions must meet detailed federal guidelines and are subject to numerous inspections by agencies.

## JUDGES' OPINION

The justices wrote:

*"Today, farmworkers continue to be excluded from the overtime protection of Washington's Minimum Wage Act (MWA). RCW 49.46.130(2)(g). This exclusion is unconstitutional on its face because it violates our state constitution's promise of equality under the law. See WASH. CONST. art. I, § 12. The exemption denies an important right to a vulnerable class, and defendants have not demonstrated it serves important governmental objectives."*

## FACT CHECK

The wording of this opinion suggests strongly that the justices believe farmworkers are a vulnerable class and because of that the exemption violates the constitution's requirements for equal protection.

The question this raises is why the justices would not consider all those currently exempt from overtime pay to also be vulnerable and therefore be owed protection under the constitution.

There are a great many Washington employees who are exempt from overtime pay. The ruling did not apply to them—only to dairy farmworkers and likely to all other farm employees. Here is a complete list of Washington workers exempt from overtime pay under the law that the justices overturned.

- Workers employed on farms or ranches, or in any agricultural or horticultural business that packs, packages, grades, stores, or delivers to market such products, or any commercial business in canning, freezing, processing or transporting these products, or in cultivating, raising, harvesting or processing oysters. [Dairy farmworkers are now excluded from this list as of November 5, 2020.]
- Seasonal employees at agricultural fairs if the worker has not worked more than 14 days per year.
- Newspaper vendors or carriers.
- Casual labor in or about private residences such as babysitters or neighborhood kids or adults that go to residents in the area and mow lawns, rake leaves or use a snow blower to remove snow even when they are paid for this work.
- Forest protection and fire prevention activities.
- Any individual whose duties require that he or she resides or sleeps at the place of his or her employment or who otherwise spends a substantial amount of time on call and not engaged in the performance of active duties.

- Seaman on American or foreign vessel. Vessel operating crews of WA State ferries operated by DOT.
- Youth camps with child care responsibilities in development of character, citizenship, or health and physical fitness, for example YMCA, scout or church camps.
- Inmate, resident, or patient of any state, county, or municipal correctional, detention, treatment, or rehab institution.
- Public elective or appointive offices.
- Volunteers for a profit or nonprofit educational, charitable or religious organization or government agency,
- Motion picture projectionists under collective bargaining agreement or other contract.
- Employees of an air carrier when such hours are voluntarily worked pursuant to a shift-trading practice.
- Executive, Administrative, Professional, Computer Professional and Outside Sales; workers who are paid on a salary basis and meet specific duties requirements.

Sales people do not share the protections of farmworkers regarding breaks, their jobs are more dangerous but the judges did not offer them the same constitutional protections as farmworkers. Nor airline employees (also more dangerous), newspaper carriers, motion picture projectionists, home healthcare workers and on and on. The reason why these are not privileged by constitutional protection is based on another highly questionable opinion provided by the justices.

## **JUDGES' OPINION**

The reason why farmworkers are singled out and all other groups not offered the same constitutional protection is explained in this comment: *"Because such groups do not enjoy equal access to the legislative process, the judiciary must be especially vigilant to make sure laws that treat them differently are justified."*

## **FACT CHECK**

This explains from the judges' point of view that sales workers, airline employees, motion picture projectionists, newspaper carriers and home healthcare workers have a different status than farmworkers. But, is it true that farmworkers have no access to the legislative process while all the others do? What is true is that because most do not speak English and are undocumented makes most very reluctant to sign their names to petitions, talk directly to the media or



*Andrea Schmitt, a lawyer with Columbia Legal Services, represents one of many often competing groups who claim to represent farmworkers. These include labor advocates Community to Community, unions UFW and FUJ, the Washington Labor Council and others. While these groups claim to represent farmworkers to the legislature, their "help" has often been very damaging to farmworkers. Employees are more aligned with farmers as the overtime issue shows. But labor activists complain about the political power of farmers--and therefore farmworkers! The judges' view that farmworkers have no access to the legislative process is exposed by the competition to be identified as representing them in court and government.*

lawmakers, and participate directly in the legislative process. But to claim they have no access to the legislature or the government ignores the clear fact of strong representation.

There are a significant number of groups and individuals who claim to represent the interests of farmworkers and these have proven to be among the most potent political voices at the national level and state level. The United Farm Workers for example, have enormous political power on issues of farm labor despite being rejected by all but fewer than 1% of California farmworkers and only representing workers at two operations in Washington. The UFW is very actively involved in Washington politics as made clear in their presentation at the January 28 Senate hearing and in their being asked by Governor Inslee to write the worker rules involving COVID-19.

A recent Senate hearing demonstrates how far off base these judges are in suggesting farmworkers have no access to lawmakers.

On January 28 Chairman Karen Keiser led a Senate Labor Committee hearing on Senate Bill 5172. It was to hear both sides on the Senator King bill aimed at preventing the judges' ill-informed ruling from being used by class action lawyers to demand three years retroactive overtime pay for farmworkers. In that hearing over 500 individuals registered to speak in opposition to the bill. Prominent among them were the farm labor groups and farm labor lawyers who claim to be advocating for farmworkers. These have been active for many

years and have proven to be one of the most potent political forces in our state. Among them are the Washington Labor Council whose Government Affairs Director, Joe Kendo, spoke strongly against the bill that would protect farmworker jobs. Andrea Schmitt of Columbia Legal Services spoke. That organization has been involved in litigation against farmers supposedly on behalf of farmworkers for many years. Ramon Torres, president of Familias Unidas por la Justicia, and Edgar Franks of Community to Community spoke. Both have been prominent in major media coverage of labor activism. They are part of the organization led by Rosalinda Guillen, one of the most powerful voices in state politics over the past few years. As noted above, a representative from the United Farm Workers also spoke against the farmworker protection bill. A

leader of the employment lawyers association, Toby Marshall, also spoke in favor of allowing the devastating class action lawsuits to continue with their demands for retroactive pay.

In other actions by these groups, other labor organizations have also spoken out supposedly in support of farmworkers. In addition to these exceptionally powerful political advocates, farmworkers are assisted by many community groups aimed at ensuring their interests are protected.

Given this, it is difficult to understand how these three judges could claim that farmworkers have no access to the legislature. The problem that farmworkers have is not lack of access, but that those who claim to represent their interests have been far more harmful to those interests than helpful. Their own agendas of generating union revenue from worker paychecks and protecting the ability of lawyers to generate millions in legal fees at the expense of farmworkers have been exposed in their opposition to this bill.

Farmworkers want to keep their jobs as they strongly expressed in the January 28 Senate hearing. So-called farmworker advocates are working against that strong desire. Does that mean that the judges are right that farmworkers do not have access to the legislature? No, because farmworker interests are strongly aligned with their employers as again they make clear in their own statements. The so-called farmworker advocates have often complained about the influence of the ag lobby. Because farmworkers overwhelmingly support the farm lobby's efforts to keep farmers in business,

Felipe Garcia, a dairy farmworker working for the same farmer for 13 years. He explained the farmworkers are worried about their jobs because if the three year retroactive pay is required, his employer will go out of business. Miguel Naverette, another dairy farmworker explained how his dairy farm employer made it possible for him to get a college degree without incurring any student debt and how he is now able to purchase a home. He also said: "I believe it is unfair to retroactively charge employers who followed the law at the time. This will force many family farms out of business."



*Young Latinx Flor de Maria Maldonado is one of many young minority farmers who will be forced out of business by the judges' ruling, subsequent lawsuits, and unwillingness of key senate leaders to protect farms and jobs. [See her testimony at the January 28, senate hearing here.](#)*

*As a farmer, the three justices accuse her of treating her farm employees as "second class citizens" and of participating in a "caste system" that puts her employees at the level of India's Dalits.*

The clear fact is that two strong lobbying groups are claiming to speak out for farmworkers. Between the two opposing positions, more than 1000 citizens registered to speak to the Senate hearing. We suspect that if newspaper carriers tried to get 500 supporters to speak to legislators to protect their jobs they may not have the same success. The three judges' assessment that farmworkers have no access to the legislature is demonstrated to be completely erroneous.

## JUDGES' OPINION

The judges expressed their opinion that because farmworkers were exempt from overtime, they are categorized as second class citizens.

*"Subjugated to second-class worker status, farmworkers are precisely the type of politically powerless minority whose interests are a central concern of equal protection."*

## FACT CHECK

Designating farmworkers as second class citizens undermines the dignity these valued and skilled employees exhibit in their work and lives.

As noted above, farmworkers are highly protected by numerous laws in their jobs and are comparatively well compensated. Because of the shortage of labor, farmworker pay was steadily rising because domestic workers can easily move to other jobs such as construction, food service, etc. Most farmworkers today are undocumented--perhaps as many as 80% or more. Lacking citizen status, as the judges erroneously accord them, does not mean they are treated as second class in any way. For those who take the time to listen to farmworkers speaking out in these videos and in the Senate hearing will discover, farmworkers have dignity and take pride in their work. Many hold supervisory and management positions on their farms and almost without exception are treated with respect and care by their employers, many who consider them a crucial part of the family farm. Employers who mistreat their employees, regardless of work category, soon find it impossible to recruit and retain quality workers.

Farm organizations such as the Idaho Dairymen's Association and others have been leaders in working to secure legal status for undocumented workers. Farmers not only provide jobs that pay comparatively well, but are active in promoting



*In the most troubling and offensive statements yet, the judges opine that racism is behind the laws involving farmworker pay, and that farmworkers are part of a "caste system" that makes them equivalent to India's Dalits, the lowest of the low. They suggest farmers are supporting this system of dishonor and degradation. It is deeply offensive to farmers, but far more to farmworkers who are rightly proud of the essential work they do and who earn income enabling them to pay for university education and buy homes. (The photo is of a Dalit child collecting garbage--not a Washington farmworker!)*

the future opportunities for their workers and their families. Juan Baldovinos is one example. Entering the US at the age of nine to join his family working in the fields of berries and fruit, Juan went to high school and from there on to university where he earned a degree in accounting and finance. He was granted citizenship as part of the Reagan amnesty law of 1987. Juan went on to work for Boeing and then secured senior executive positions with several companies. He currently serves as CFO for a prominent family berry farm. He credits strong support from his employers throughout the years for being able to go to school, provide for his family and attain leadership positions. He is a strong farmworker advocate working to ensure farmworkers can enjoy the same benefits of farm employment as he has.

"Second class" would be an offensive designation to Juan, Felipe, Miguel and thousands of other farmworkers who do their jobs with dignity and pride.

## JUDGES' OPINION

In the most startling and offensive statements the three justices raise the issue of racism as a justification for their actions that have proven so harmful to those they claim are victims:

*"Racism directly influenced these exclusionary policies. Plantation agriculture, which dominated the southern economy, depended on the exploitation of a black labor force."*

And Later:

*"Excluding farmworkers from health and safety protections cannot be justified by an assertion that the agricultural industry, and society's general welfare, depends on a caste system that is repugnant to our nation's best self."*

## FACT CHECK

The law they overturned by judicial fiat was in place in Washington since 1959. To suggest this law was racist ignores the fact that in 1959 there were very few non-white farmworkers. Most were members of the family owning and running the



*The judges opinion suggesting that farmers may have to pay three years overtime retroactive pay has triggered over 30 class action lawsuits demanding this pay. Senator Keiser, Chair of the Senate Labor Committee, amended a proposed bill that would require ALL farmers to pay three years back pay plus interest.*

*The judges changed a 61 year old law . Farmers paid their employees fairly and followed that law. The sudden change is one thing. Demanding retroactive pay is outrageously unjust. Everyone would feel abused if they followed a speed limit for 61 years, had it suddenly changed and then be told they owe three years of tickets for each day they exceeded the new limit.*

*The judges and Senators who think this is just have a very different idea of justice than almost everyone else.*

farm. To link a much-deliberated law to political actions taken nearly 100 years ago in a part of the nation racked with racial issues is a remarkable stretch.

But what is likely the most offensive statement made is the suggestion of a caste system defining farming. This not only denigrates the farmers who provide job and improvement opportunities for thousands of employees, but is even more offensive and denigrating to the farmworkers.

The farmworkers who spoke at the hearing and who spoke out on these videos clearly do not see themselves as victims, let alone reduced to the lowest of the low as the Dalits are in India. Does Justice Gonzales believe as a Latinx he is treated as or viewed as a Dalit? If not, does he and the others who signed this opinion believe that those who work on farms are equivalent to Dalits simply because they grow food? Farmworkers certainly do not view themselves that way and if the judges knew or even talked to any of them, they would understand how offensive this statement by the judges is to them.

## **SUMMARY**

The three judges who wrote the very disturbing concurring opinion have demonstrated remarkable ignorance of key facts as well as prejudices that are proving exceptionally harmful. Their concurring opinion calls into question their views of justice itself.

Factually they are wrong on nearly every statement made. Politically they are wrong in that their ruling has greatly harmed those who they likely believed they were helping. The harm is just emerging now that over 30 class action lawsuits have been filed against farms based on the indication in the ruling that farms should pay three years retroactive pay for overtime.

Even from a justice point of view, the majority decision suggesting retroactive pay calls into question their very concept of justice. The state law that allows for such retroactive pay specifically applies to employers who violated the law. Farmers did not violate the law but followed it precisely—and paid their employees well based on the exemption. For judges to suggest that following the law should not protect one against penalties when the law is summarily changed calls into question their idea of justice.

Unless lawmakers act to protect farmworkers against the very harmful decisions and opinions of these judges, most of the 100,000 current farmworker jobs in our state will be lost. Will justice be done?